November 4, 1993

The Honorable Ronald T. Y. Moon
Chief Justice
Supreme Court of Hawaii
Judicial Council of Hawaii
P.O. Box 2560
Honolulu, Hawaii 96804

Dear Chief Justice Moon:

Re: Clarification Concerning Application of OIP Opinion Letter No. 93-13

This is in response to your letter to the Office of Information Practices ("OIP") dated September 27, 1993. In your letter to the OIP, you requested a clarification of whether the conclusion set forth in OIP Opinion Letter No. 93-13 (Sept. 17, 1993) applies only prospectively, that is, to lists of nominees for future State Ethics Commission ("Commission") vacancies that are submitted to the Governor by the Judicial Council, or whether the conclusion in OIP Opinion Letter No. 93-13 also applies to lists of nominees that were submitted to the Governor before the date of the OIP's opinion letter. Because OIP Opinion Letter No. 93-13 represents the OIP's interpretation of the UIPA as applied to the list of Commission nominees, we believe that your question can be answered by examining the larger question of whether the UIPA affects the disclosure of government records that were compiled, created, or obtained before July 1, 1989, the enactment date of the UIPA. We also believe that your letter to the OIP raises a separate issue concerning the effect of oral assurances of confidentiality that may have been given to some of the applicants for the Commission vacancies.

ISSUES PRESENTED

I. Whether the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"),

applies to government records created, compiled, or obtained by a State or county agency before the effective date of the UIPA, July 1, 1989.

II. Whether, under the UIPA, the lists submitted by the Judicial Council to the Governor that identify nominees to fill Commission vacancies must be made available for public inspection and copying upon request when some or all of the applicants were given oral assurances that their identities would remain confidential.

BRIEF ANSWERS

I. Yes. In our opinion, application of the UIPA's provisions to records compiled, created, or obtained by an agency before the UIPA's effective date would not result in the retroactive application of the UIPA. Rather, the UIPA imposes only a prospective duty upon government agencies after July 1, 1989, to disclose all government records, except as provided by the exceptions set forth in section 92F-13, Hawaii Revised Statutes. Haw. Rev. Stat. 92F-11(b) (Supp. 1992).

Based upon case law from other jurisdictions and upon the conclusion set forth in OIP Opinion Letter No. 90-39 (Dec. 31, 1990) concerning a similar issue, we believe that the UIPA applies to all government records, including those that were compiled, created, or obtained before the enactment date of the UIPA, July 1, 1989. Thus, it follows that the conclusion set forth in OIP Opinion Letter No. 93-13 applies to all lists of nominees for Commission vacancies, including those lists that were compiled before the date of OIP Opinion Letter No. 93-13.

II. Yes. It is the OIP's understanding that some of the applicants may have been orally informed that their names would be kept confidential, unless they were appointed by the Governor.[1] Assuming this to be the case, we recognize that such

[1]The Judicial Council informed the OIP that it is unable to locate in its files any records indicating that Commission applicants were given written assurances of confidentiality. In OIP Opinion Letter No. 90-39 (Dec. 31, 1990), the OIP deferred to the Hawaii State Attorney General for determination of whether the disclosure of information that is the subject of a written confidentiality agreement entered into before the UIPA's effective date would result in an unconstitutional impairment of contract.

oral assurances of confidentiality may be a factor to consider in determining the weight of the applicants' privacy interests for purposes of the UIPA's public interest balancing test.

To the extent that such oral assurances were made, they must yield to the declared public policy of this State that, except as provided in section 92F-13, Hawaii Revised Statutes, each agency shall make government records available for inspection and copying. Any oral assurances of confidentiality must also yield to the UIPA policy that requires the balancing of the individual's privacy interest and the public interest in disclosure, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy.

Based upon the reasons set forth in OIP Opinion Letter No. 93-13 (Sept. 17, 1993), we are of the opinion that, notwithstanding the oral assurances of confidentiality, the significant public interest in disclosure outweighs the applicants' privacy interests in the fact that they were nominated by the Judicial Council to a Commission vacancy.

Accordingly, the conclusion set forth in OIP Opinion Letter No. 93-13 applies to all lists of nominees for Commission vacancies submitted by the Judicial Council to the Governor, including those lists compiled before the date of OIP Opinion Letter No. 93-13; and the Judicial Council, upon request, must make all lists of Commission nominees still maintained by the Judicial Council available for public inspection and copying.

FACTS

On September 17, 1993, the OIP issued OIP Opinion Letter No. 93-13, which found that the list of nominees submitted by the Judicial Council to the Governor to fill the vacancy created by the expiration of the term of Commissioner Laurie Loomis on the Commission is a public government record under the UIPA, and must be made available for inspection and copying upon request. OIP Opinion Letter No. 93-13 did not address the issue concerning whether previous lists of nominees to fill Commission vacancies must also be made available for inspection and copying under the UIPA. In a letter to the OIP dated September 27, 1993, you requested the OIP to provide a clarification of the conclusion set forth in OIP Opinion Letter No. 93-13. Also, in your letter to the OIP, you expressed concern over the privacy rights of past applicants for Commission vacancies who may have been orally informed that their names would remain confidential unless, of

course, they were appointed by the Governor.

DISCUSSION

I. "RETROACTIVE" APPLICATION OF THE UIPA

The UIPA states that "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. 92F-11(b) (Supp. 1992). Section 92F-3, Hawaii Revised Statutes, provides that the term "'[g]overnment record' means information maintained by an agency in written, auditory, visual, electronic, or other physical form." This definition does not differentiate between information compiled, created, or obtained by an agency either before or after the UIPA's effective date, July 1, 1989. In addition, the UIPA does not contain any other provision that expressly treats government records compiled before the UIPA's effective date differently than those created after July 1, 1989. We believe that the applicability of the UIPA to agency records compiled, created, or obtained by an agency before its effective date was obviously intended by the Legislature. Indeed, section 92F-11(a), Hawaii Revised Statutes, unambiguously provides that "[a]ll government records are open to public inspection unless access is restricted or closed by law." (Emphasis added).

We previously have had an opportunity to address this issue. In OIP Opinion Letter No. 90-12 (Feb. 26, 1990), the OIP found that, under the UIPA, certain information concerning sexual harassment charges at the University of Hawaii must be disclosed. In OIP Opinion Letter No. 90-39 (Dec. 31, 1990), we clarified several corollary issues pertaining to OIP Opinion Letter No. 90-12. One of the corollary issues concerned whether the UIPA applies to information concerning sexual harassment charges that were resolved at the University of Hawaii ("UH") before the enactment of the UIPA on July 1, 1989. Specifically, OIP Opinion Letter No. 90-39 states that:

> [B]efore the effective date of the UIPA, [UH] entered into "confidential settlement agreements" with certain faculty members formally charged with sexual harassment, in return for agreed upon "remedial action." The UH questions whether this would also result in a retroactive application of the UIPA to government records created or maintained before the UIPA's effective date, such

> that the names of faculty members formally charged with sexual harassment and disciplinary action taken in accordance with the UH's procedure must now be disclosed, notwithstanding past express promises of confidentiality.

OIP Op. Ltr. No. 90-39 at 11.

In OIP Opinion Letter No. 90-39, we noted that section 1-3, Hawaii Revised Statutes, states that "[n]o law has any retrospective operation unless otherwise expressed or obviously intended." However, we found that "the provisions of the UIPA control access to or the protection of records, regardless of when they were created, provided that they are 'maintained' by an agency. This, in our opinion, does not result in the retrospective application of a law." OIP Op. Ltr. No. 90-39 at 13.

Our research of persuasive state court decisions further supports the conclusion expressed in OIP Opinion Letter No. 90-39. Specifically, in State ex rel. Beacon Journal Publishing Co. v. University of Akron, 415 N.E.2d 310, 313 (Ohio 1980), the Ohio Supreme Court found that the Ohio public records law applies to "'all public records' and makes no distinction for those records compiled prior to its effective date." Although the records requested in Akron were created before the new public records law took effect, the court reasoned that "[s]ince the statute merely deals with record disclosure, not record keeping, only a prospective duty is imposed upon those maintaining the public records." Id. (emphasis added).

A Florida appellate court addressed the issue of whether to apply a newly enacted exemption in a state open records statute to a record that was created before the enactment date of the new exemption. In News-Press Publishing Co. v. Kaune, 511 So. 2d 1023 (Fla. Dist. Ct. App. 1987), the court stated that "[i]t seems to us indisputable that if the legislature determines that 'all documents pertaining to subject "a" in personnel files shall be exempt,' it intends, unless it specifies otherwise, that on the effective date of the law creating the exemption all such documents are exempt from any request for disclosure made thereafter regardless of when they came into existence or first found their way into the public records." Id. at 1026 (emphasis added).

Likewise, in Industrial Found. of the South v. Texas

Industrial Accident Bd., 540 S.W.2d 668 (Tex. 1976), the Texas Supreme Court held that the Texas Open Records Act was intended to apply to all records kept by governmental bodies whether acquired before or after the Act's effective date.

> The Legislature has not, by determining that government information formerly kept confidential should be disclosed, impaired any vested right of a claimant to the confidentiality of the information. Unless there is such an impingement upon a vested right, the Legislature may require disclosure of information even though it was deemed confidential by an agency prior to the Act's effective date . . . .

Industrial Found., 540 S.W.2d at 677-678.

We recognize that courts in other jurisdictions have found that state public record laws or amendments thereto should not apply retroactively; however, those cases can be distinguished from the facts before us. Each of those cases involved situations where a member of the public had submitted a public record request to an agency before the effective date of the statute or amendment, and the courts held that the law in effect at the time of the person's request must be applied to determine access to the requested records. See Dade County School Bd. v. Miami Herald Publishing Co., 443 So. 2d 268 (Fla. App. 3 Dist. 1983); Tex. v. City of Topeka Police and Fire Civil Serv. Comm'n, 697 P.2d 1279 (Kan. 1985).

Moreover, we do not believe that applying the UIPA, which places a prospective duty upon agencies after July 1, 1989 to disclose government records they maintain except as provided by section 92F-13, Hawaii Revised Statutes, would result in the retroactive application of the UIPA. See, e.g. Burger v. Unemployment Compensation Bd. of Review, 77 A.2d 737, 739 (Pa. 1951) ("[a]n act is not retroactively construed when applied to a condition existing on its effective date even though the condition results from events which occurred prior to that date"); EPA v. New Orleans Pub. Serv. Comm., 826 F.2d 361 (5th Cir. 1987) ("a law is not made retroactive because it alters the existing classification of a thing or if it draws upon antecedent facts for its operation"); Frisbie v. Sunshine Mining Co., 457 P.2d 408 (Idaho 1969) (a law is not retroactive because part of the factual situation to which it is applied occurred prior to its enactment).

Even assuming arguendo that in some situations the application of the UIPA to records created, compiled, or obtained by an agency before the Act's effective date results in the retroactive application of the UIPA in some ancillary sense, we note that the application of the UIPA in such fashion would not impair any vested rights, since "[t]here is no vested right in the confidentiality of records which were compiled prior to [the] enactment of an open records act." 2 N. Singer, Sutherland Statutory Construction 41.06 at 381 (5th ed. 1992), quoting Texas Ind. Accident Bd v. Industrial Found. of the South, 526 S.W.2d 211 (Tex. Civ. App. 1975); see also OIP Op. Ltr. No. 90-39 (Dec. 31, 1990).

Accordingly, it is our opinion that the provisions of the UIPA apply irrespective of whether a government record was created, compiled, or obtained by an agency before the UIPA's effective date, at least where the person's request to inspect and copy government records is received by the agency after July 1, 1989. Therefore, we conclude that lists of nominees for past Commission vacancies transmitted by the Judicial Council to the Governor's office are government records subject to the UIPA, irrespective of whether such lists were created or received by the Governor before July 1, 1989 or before the date of OIP Opinion Letter No. 93-13, so long as an agency currently maintains a copy of such lists.

We now turn to a consideration of whether past assurances of confidentiality, which, according to your letter to the OIP, may have been given to some of the nominees, affects our conclusions set forth in OIP Opinion Letter No. 93-13.

II. ACCESS TO PAST LISTS OF JUDICIAL COUNCIL NOMINEES

A. **Effect of Past Oral Assurances of Confidentiality**

The Judicial Council has expressed concerns about the privacy rights of Commission applicants who may have been orally informed that their identities would remain confidential unless they were appointed by the Governor to the Commission.[2] We

[2]The OIP has been informed by the Judicial Council that it is unable to locate any records in its files indicating that Commission applicants were given written assurances of confidentiality.

believe that, although these past oral assurances of confidentiality may affect the strength of the privacy interest to be considered under the UIPA's balancing test, section 92F-14(a), Hawaii Revised Statutes, such assurances in and of themselves do not protect a record from disclosure under section 92F-13, Hawaii Revised Statutes, for such a result would vitiate the UIPA's balancing test.[3] Haw. Rev. Stat. 92F-2 and 92F-14(a) (Supp. 1992).

In a previous OIP advisory opinion, the OIP found that a confidentiality clause in a settlement agreement to which a government agency is a party must yield to the dictates of the UIPA because such a clause would be void as against public policy. OIP Op. Ltr. No. 89-10 at 8, n.6 (Dec. 12, 1989). Courts in other jurisdictions have also held that promises of confidentiality alone cannot override or defeat the disclosure provisions of state and federal Freedom of Information laws. See Petkas v. Staats, 501 F.2d 887, 889 (D.C. Cir. 1974); Ackerly v. Ley, 420 F.2d 1336, 1340 n.3 (D.C. Cir. 1969); Robles v. EPA, 484 F.2d 843, 846 (4th Cir. 1973); Trombley v. Bellows Falls Union H.S. Dist., 624 A.2d 857, 862 (Utah 1993); Nechler v. Casey, 353 S.E.2d 799, 809 (W.Va. 1985); Mills v. Doyle, 407 So. 2d 348, 350 2 (Fla. Dist. Ct. App. 1981).

If prior oral assurances of confidentiality were made by the Judicial Council to any of the applicants for Commission vacancies, these assurances may serve to strengthen the privacy interest of the applicants. However, we are still of the opinion that, for the reasons set forth in OIP Opinion Letter No. 93-13, there is an overriding public interest in the disclosure of the identities of the two final nominees selected by the Judicial Council.

B. Whether Disclosure of Past Lists Would Be A "Clearly Unwarranted Invasion of Privacy"

In OIP Opinion Letter No. 93-13, we observed that disclosure of the Judicial Council's nominees would promote the public

[3]Whether the disclosure of information which is the subject of a written "confidentiality agreement" entered into before the UIPA's effective date would result in an unconstitutional impairment of contract must be left to a determination by the Hawaii State Attorney General, and not the OIP. OIP Op. Ltr. No. 90-39 at 14 (Dec. 31, 1990).

interest in disclosure in several ways:

(1) It would shed significant light upon the "decisions and actions" of government agencies;

(2) It would permit members of the public to evaluate the two individuals nominated by the Judicial Council;

(3) It would shed light upon the end product of the Judicial Council's deliberations, upon the actions of two co-equal branches of government, and ensure that the selection process is conducted in a manner which assures that the Commission members are independent and impartial.

We do not believe that these substantial public interests are significantly diminished when considering whether the disclosure of lists for past Commission vacancies would be a "clearly unwarranted" invasion of personal privacy.

Accordingly, despite possibly stronger personal privacy interests to be considered, we believe that under section 92F-14(a), Hawaii Revised Statutes, the public interest in disclosure outweighs the nominees' privacy interests. The disclosure of the Judicial Council's lists of Commission nominees, including the lists sent to the Governor's Office in the past, would not result in a "clearly unwarranted invasion of personal privacy" under section 92F-13(1), Hawaii Revised Statutes. Moreover, based upon the conclusions set forth in OIP Opinion Letter No. 93-13, we believe that, under the UIPA, all of the lists of Commission nominees compiled by the Judicial Council and transmitted to the Governor, including the lists sent to the Governor for past Commission vacancies, must be made available for public inspection and copying upon request.

CONCLUSION

The UIPA does not contain any provision which differentiates access to records compiled, created, or obtained before the effective date of the UIPA, July 1, 1989. Based upon the UIPA, case law from other jurisdiction, and previous OIP advisory opinions, we conclude that the provisions of the UIPA apply to all government records currently maintained by an agency.

Although prior oral assurances of confidentiality made by

the Judicial Council to some or all of the applicants for Commission vacancies may serve to strengthen the privacy interest to be considered in the UIPA's balancing test, we nevertheless believe that the significant public interest in disclosure of the list of nominees outweighs the privacy interest of the applicants. Consequently, for the reasons set forth in OIP Opinion Letter No. 93-13, we are of the opinion that all of the lists of Commission nominees transmitted to the Governor's Office, and maintained by the Judicial Council, must be made available, under the UIPA, for public inspection and copying upon request.

Very truly yours,

Stella M. Lee
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

SML:sc
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